

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARK A. GUESS,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 03-741-JJF
	:	
THOMAS L. CARROLL, Warden,	:	
	:	
Respondent.	:	

Mark A. Guess, Pro Se Petitioner.

Loren C. Meyers, Esquire, Chief of Appeals Division of THE
DEPARTMENT OF JUSTICE OF THE STATE OF DELAWARE, Wilmington,
Delaware.
Attorney for Respondent.

MEMORANDUM OPINION

March 10, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2) filed by Petitioner, Mark A. Guess. For the reasons set forth below, Petitioner's Section 2254 Petition will be dismissed and the Writ of Habeas Corpus will be denied.

BACKGROUND

In September 2001, Petitioner was indicted on charges of burglary, conspiracy, theft and numerous traffic offenses in connection with Petitioner's alleged commission of several burglaries at hotels located in Rehoboth Beach and Dewey Beach, Delaware. The factual background related to the charges is premised on the evidence adduced by the State at trial. See State's Answering Brief, Guess v. State, No. 117, 2002 (Del. Jan. 6, 2003).

On June 30, 2001, at 10:59 p.m. a gentleman who was staying as a guest at the Atlantic Budget Inn in Rehoboth Beach, Delaware observed two African American men apparently coming from his hotel room. Upon entering his room, the guest observed that his wallet had been moved and his Visa card was missing. The guest attempted to chase the men but could not find them, so he notified the hotel office. The guest described the men as in their late 20s or 30s.

Shortly after 11 p.m. the same night, two African American men purchased 20 bottles of champagne, a bottle of cognac and a

30-pack of Budweiser Beer with the stolen credit card at a nearby liquor store. The liquor purchases totaled between six and seven hundred dollars. The clerk described the two men who made the purchases as African American individuals who were in their late 20s and 30s. The clerk also noted that the two men were driving an automobile which he described as a Nissan Maxima, light in color.

Nearly a month later, on July 23, 2001, a second victim reported that his room at the Dewey Beach Suites Hotel had been burglarized. A video camera, two other cameras, an overnight bag containing an electric razor, a watch, an ATM card and some cash were missing from the room.

On July 24, 2001, a third hotel guest checked into the Henlopen Hotel in Rehoboth Beach. The guest had \$1128 in cash in an envelop and five American Express Traveler's checks. The guest did not need to use this money during his trip and did not realize it was missing until he returned home.

Also on July 24, 2001, the operator of the Dewey Beach Suites Hotel received a phone call from a guest indicating that someone was trying to get into his room. The operator ran upstairs and saw an African American man about six feet tall going down another staircase about 30 feet away. The man joined another African American man in a white Nissan Maxima with a Pennsylvania tag. The car sped out of the garage, jumped the

curb, and headed north on Route 1. The hotel operator got a partial license plate number on the vehicle and called 911.

At approximately 6:15 p.m. on July 24, 2001, Captain Pete Schwartzkopf of the Delaware State Police was driving an unmarked car on Route 1 when he observed a white car traveling northbound on the shoulder passing three lanes of heavy traffic at a speed of about 75 miles per hour. Schwartzkopf approached the car which was stopped at a light and noticed that it had Pennsylvania tags. Schwartzkopf then heard a broadcast from a Dewey Beach police officer about a white Nissan Maxima with Pennsylvania tags bearing the letters "CDA" containing two black males who had allegedly just left the scene of a burglary. Schwartzkopf confirmed that the car he observed was the car being sought by police and instructed Corporal Anthony Mendez to stop the car.

Mendez was driving a marked police car. He activated his lights and siren and attempted to block the Nissan before it crossed the Five Points intersection at Routes 1 and 9. The Nissan maneuvered around Mendez's vehicle and continued north on Route 1 at a speed of more than 100 miles per hour with police in pursuit. The chase ended when the Nissan's engine failed and the car rolled to a stop behind the grandstand at Dover Downs.

Petitioner and Jackie Jackson exited the vehicle and were arrested. Inside the car, the police found three travelers checks signed by the guest who had been at the Henlopen Hotel, an

electric razor in a black bag that was identified at trial as belonging to the guest at the Dewey Beach Suites hotel, and numerous hotel door knob "Do Not Disturb" signs including some that were used at the Atlantic Budget Inn.

After the suspects' arrest, the police approached the clerk at the liquor store with two sets of photographs. The clerk identified Petitioner and Jackson from the photo lineups presented to him.

In January 2002, a superior court jury convicted Defendant of two counts of second degree burglary, one count of attempted second degree burglary, three counts of second degree conspiracy and multiple theft and traffic offenses. The Superior Court granted a new trial on the attempted burglary and related conspiracy convictions, and those charges were eventually not pressed by the prosecution.

In February 2002, Petitioner was sentenced to a total of 10 years imprisonment. On direct appeal, the Delaware Supreme Court affirmed Petitioner's convictions. Guess v. State, No. 117, 2002 (Del. Jan. 6, 2003). Petitioner did not file any motions for post-conviction relief.

By his Petition for federal habeas relief, Petitioner raises three claims. Specifically, Petitioner contends that (1) the trial judge erred when he denied Petitioner's pre-trial motion to sever charges; (2) the trial judge erred in joining the trials of

Petitioner and his co-defendant; and (3) the "package deal" plea offer contingent on the acceptance of the deal by Petitioner's co-defendant was unfair and violated public policy.

STANDARD OF REVIEW

I. Legal Principles Governing Exhaustion and Procedural Default

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies" to satisfy exhaustion,

he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002). The petitioner bears the burden of establishing that the exhaustion requirement has been satisfied. Landano v. Rafferty, 897 F.2d 661, 670-671 (3d Cir. 1990).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is unavailable. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Lines, 208 F.3d at 160. In addition, where a state court refuses to consider a petitioner's claims because he failed to comply with an independent and adequate state procedural rule, his claims are deemed exhausted but procedurally defaulted. Harris v. Reed, 489 U.S. 255, 263 (1989); Werts, 228 F.3d at 192. A federal court may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lines, 208 F.3d at 160.

II. Review Under the AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") mandates the following standards of review:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2). Thus, a federal court may issue a writ of habeas corpus under Section 2254(d)(1) only if it finds that the state court decision on the merits of a claim (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law.

Williams v. Taylor, 529 U.S. 362, 412 (2000).

Under the AEDPA, a state court's factual determinations are presumed correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Id. The presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir.2000), cert. denied, 531 U.S. 1084 (2001).

DISCUSSION

I. Petitioner's Claims That The Trial Judge Erred In Failing To Sever His Charges And Joining The Trials Of Petitioner And His Co-defendant

Petitioner contends that the trial judge erred when he denied Petitioner's motion to sever his various traffic offenses from the burglary and theft charges against him. Petitioner also contends that the trial judge should not have joined his trial with the trial of his co-defendant, Jackson, because Jackson appeared pro se during the trial. Respondent contends that Petitioner failed to exhaust these claim, because he raised these issues solely as errors of state law, instead of as constitutional issues.

To exhaust state remedies, a petitioner must have presented the precise legal and factual basis of his federal claims to the state court. To this effect, the petitioner's "state court pleadings and briefs must demonstrate that he has presented the legal theory and supporting facts in his federal habeas petition." Doctor v. Alters, 96 F.3d 675, 678 (3d Cir. 1996). Although the petitioner need not cite "'book and verse' of the federal constitution" to put the state court on notice that he or she is asserting a constitutional claim, the petitioner "must have communicated to the state courts in some way that [he or she was] asserting a claim predicated on federal law." McCandess v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). Absent an explicit

reference to federal law, the petitioner can communicate that he or she is asserting a federal claim in the following ways:

(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claims in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. (quoting Daye v. Attorney General of New York, 696 F.2d 186 (2d Cir. 1982) (en banc)).

After reviewing the briefs filed by Petitioner on direct appeal and the arguments raised and the cases cited therein, the Court concludes that Petitioner's claims concerning the severing of his charges and the joinder of his co-defendant were raised as state law claims, and not as a federal constitutional claims. With respect to his claim that his traffic offenses should have been severed from the other charges, Petitioner's brief on direct appeal is directed solely to state law, and Petitioner cites to only Delaware cases focusing on a state law analysis.

With respect to his claim concerning the alleged improper joinder of his co-defendant, Petitioner does refer to the right to a fair trial, but as this Court has recognized, a Petitioner's brief reference to a right to a fair trial is insufficient to put the state court on notice that he is raising a federal constitutional claim where, as here, the Petitioner did not analyze his claim in constitutional terms. Johnson v. Carroll,

250 F. Supp. 2d 395, 400-401 (D. Del. 2003); Bright v. Snyder, 218 F. Supp. 2d 573, 578-579 (D. Del. 2002). In this case, Petitioner analyzed his joinder claim solely by reference to state law and Superior Court Criminal Rule 7(e). The Court's conclusion that Petitioner did not put the state court on notice that he was raising a federal constitutional claim is further bolstered by the manner in which the state responded to Petitioner's claim in its Answering Brief. The State's Answering Brief contains no federal constitutional analysis of the joinder issue in the context of the right to a fair trial and analyzes the issue as a matter of state law. See Brown v. Cuyler, 669 F.2d 155, 159 (3d Cir. 1982) (holding that state's understanding of petitioner's argument as reflected in state's answering brief, may be probative on question of whether petitioner exhausted state remedies). Further, Petitioner's presentation of this issue to the Delaware Supreme Court stands in contrasts to his presentation of the issue to the trial court. As the Supreme Court noted in its decision on direct appeal, Petitioner objected at trial to the joinder of his co-defendant arguing that the joinder might result in potential problems under Burton v. United States, 391 U.S. 123 (1968). However, Petitioner presented no such argument under Burton in his state supreme court filings, and it is evident from the manner in which the Delaware Supreme Court addressed Petitioner's argument that it believed Petitioner

had only raised his claim in terms of state law. Accordingly, the Court concludes that Petitioner has failed to establish that his claims of error based on improper joinder and failure to sever were exhausted. Duncan v. Henry, 513 U.S. 364, 365 (1995).

However, the exhaustion requirement is excused where no available state corrective process exists or the particular circumstances of the case render the state process ineffective to protect the petitioner's rights. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). In this case, Petitioner failed to present his federal claims to the Delaware Supreme Court on direct appeal and cannot establish cause and prejudice for his failure, and therefore, under Superior Court Criminal Rule 61(i)(3), Petitioner is foreclosed from seeking post-conviction remedies in the Delaware state courts. Accordingly, the Court concludes that Petitioner is excused from the exhaustion requirement. Johnson, 250 F. Supp. 2d at 401; Bright, 218 F. Supp. 2d at 580; Gattis v. Snyder, 46 F. Supp. 2d 344, 373 (D. Del. 1999); see also Chambers v. Kearney, 2001 WL 698303, *1 (D. Del. 2001).

Although exhaustion is excused with regard to Petitioner's claims, the Court concludes that Petitioner's claims are procedurally barred. Because Petitioner procedurally defaulted his claims in the state court, federal habeas review of Petitioner's claims is precluded, unless Petitioner demonstrates

cause for his failure to raise the issue in the state court and actual prejudice, or that a miscarriage of justice will result if the Court refuses to hear his claims. See Coleman, 501 U.S. at 750-51.

In order to demonstrate cause for a procedural default, a petitioner must show "some objective factor external to the defense" precluded his compliance with state procedural rules. McClesky v. Zant, 499 U.S. 467, 493 (1991). In reviewing the record, the Court concludes that Petitioner has not alleged and the record does not reveal cause for the procedural default of Petitioner's claims.¹ Because Petitioner has failed to establish cause for his procedural default, the Court need not consider the question of actual prejudice. See Murray v. Carrier, 477 U.S. 527, 533 (1986); Lawrie v. Snyder, 9 F. Supp. 2d 428, 453 (D. Del. 1998).

Moreover, the Court concludes that Petitioner cannot establish that a miscarriage of justice will result if the Court

¹ In his Motion For Stay And/Or Traverse To The State's Answer (D.I. 13), Petitioner addresses the State's claim that he failed to exhaust his state remedies. However, Petitioner does not advance any cause for his failure to exhaust state remedies and merely insists that his claims were exhausted. To the extent that Petitioner, by his Motion, seeks a stay to exhaust any unexhausted claims, the Court concludes that a stay is not required, because exhaustion is excused. Further, the content of Petitioner's Motion is effectively a traverse to the State's Answer, and a further traverse is not required. Accordingly, the Court will also deny Petitioner's Motion For Stay And/Or Traverse.

does not consider Petitioner's claims. To establish a "miscarriage of justice," a petitioner must show "that it is more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 326 (1995). The miscarriage of justice exception applies only in extraordinary cases and is "concerned with actual innocence as compared to legal innocence." Sawyer v. Whitley, 505 U.S. 333, 339 (1992).

In this case, Petitioner has presented no colorable evidence of his actual innocence. Indeed, Petitioner makes no claim that he is actually innocent. Thus, the Court concludes that Petitioner has not established that a miscarriage of justice will result if the Court does not consider the merits of Petitioner's claims. Accordingly, the Court will dismiss Petitioner's claims regarding the severance of his charges and the joinder of his case with that of his co-defendant.²

² Even if the Court were to conclude that the exhaustion requirement was satisfied with respect to Petitioner's claim regarding the improper joinder of his co-defendant based on the Delaware Supreme Court's reference to the United States Supreme Court's decision in Zafiro v. United States, 506 U.S. 534, 539 (1993), the Court would conclude that Petitioner is not entitled to relief on the merits of his claim. As the Supreme Court recognized in Zafiro, a trial judge should only grant a severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. Generally, the decision of whether to grant a motion for severance rests within the sound discretion of the trial court and a criminal defendant has no constitutional right to severance unless there is a strong showing of prejudice caused by the joint trial. United States v. Hart, 273 F.3d 363, 370 (3d Cir.2001); U.S. v. Console, 13 F.3d 641, 655 (3d Cir.1993). Mutually

II. Petitioner's Claim That The "Package Deal" Plea Offer Was Unfair And Violated Public Policy

Petitioner next contends that his due process rights were violated when the prosecutor offered him a "package deal" plea offer that was contingent upon the acceptance of the deal by his co-defendant. Petitioner presented his claim in terms of public policy violations, the State addressed the claim by mentioning a Supreme Court case, and the Delaware Supreme Court addressed Petitioner's claim in the context of a due process claim

antagonistic defenses are not prejudicial per se, and the fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance. Zafiro, 506 U.S. at 538.

In this case, Petitioner has not established that the joinder of his co-defendant compromised any of his trial rights or prevented the jury from making a reliable assessment of his guilt or innocence. The record demonstrates that Petitioner knew from the onset that he might be tried together with his co-defendant, and Petitioner has not articulated any prejudice resulting from the joint trial. The prosecutor did not introduce the defendants' statements into the record, and although Petitioner's co-defendant proceeded pro se, Petitioner has not shown that his ability to present his defense was compromised. Further, the record establishes that the trial judge dismissed a juror who commented on Petitioner's co-defendant, thereby obviating any prejudice stemming from that juror's service. To the extent that the analysis of Petitioner's claim under federal law overlaps with the analysis of the claim under state law and it can be said that the Delaware Supreme Court addressed this claim as a federal constitutional matter, it appears to the Court that the Delaware Supreme Court recognized these points in its analysis, and the Court cannot conclude that its decision was contrary to the law or involved an unreasonable application of the facts to the law. Accordingly, the Court concludes that Petitioner is not entitled to relief, even if his claim of improper joinder is considered on the merits.

referring to Albury v. State, 434 U.S. 357, 363-365 (1978) and other federal court decisions employing a constitutional analysis. Accordingly, the Court concludes that Petitioner's claim was fairly presented to the state supreme court, and therefore, the exhaustion requirement was satisfied.

After reviewing Petitioner's claim in light of the standards for federal habeas review, the Court concludes that Petitioner cannot establish that the state supreme court's decision was contrary to or involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The Supreme Court has recognized that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." Weatherford v. Bursey, 429 U.S. 545, 561 (1977). Courts considering the type of plea offered to Petitioner in this case have concluded, based on Weatherford, that such plea offers are permissible under the Due Process Clause. See e.g. United States v. Gonzalez-Vazquez, 219 F.3d 37, 43 (1st Cir. 2000); Nguyen v. United States, 114 F.3d 699, 704-705 (8th Cir. 1997); United States v. Gonzales, 918 F.2d 1129, 1133-1134 (3d Cir. 1990). The Delaware Supreme Court recognized these principles and appropriately applied them to the facts of this case. Accordingly, the Court concludes that Petitioner is not entitled to relief on his claim that his plea offer violated his due process rights.

III. Certificate of Appealability

Finally, the Court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The Court may issue a certificate of appealability only if Petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this standard, Petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, the Court has determined that Petitioner is not entitled to federal habeas relief. The Court is persuaded that reasonable jurists would not debate the correctness of its assessments. Because the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

CONCLUSION

For the reasons discussed, the Court will dismiss the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Mark A. Guess and deny the Writ of Habeas Corpus.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARK A. GUESS,	:	
	:	
Petitioner,	:	
v.	:	Civil Action No. 03-741-JJF
	:	
THOMAS L. CARROLL, Warden,	:	
	:	
Respondent.	:	

O R D E R

At Wilmington, this 10th day of March 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2) filed by Petitioner, Mark A. Guess, is DISMISSED and the Writ Of Habeas Corpus is DENIED.

2. The Court declines to issue a certificate of appealability for failure to satisfy the standard under 28 U.S.C. § 2253(c) (2).

3. Petitioner's Motion For Stay And/Or Traverse To The State's Answer (D.I. 13) is DENIED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE